

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

ROBERT KELLY,

Plaintiff,

v.

THE CORPORATION OF THE PRESIDENT
OF THE CHURCH OF JESUS CHRIST OF
LATTER-DAY SAINTS, a Utah corporation
sole, a/k/a "MORMON CHURCH",

Defendant.

NO. 04-2338 RSM

SPECIAL VERDICT FORM
PROPOSED BY DEFENDANT
(REVISED)

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: Did Plaintiff Robert Kelly commence this action within the period of
time required by law?

ANSWER: Yes _____ No _____

(INSTRUCTION: If you answered Question 1 "yes", go to question 2. If you answered
Question 1 "no," sign this verdict form).

QUESTION 2: Were any of the following negligent?

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(Answer "yes" or "no" after the name of the defendant and the name of each entity not party to this action.)

ANSWER:

	Yes	No
Defendant Church	_____	_____
Non-Party Dr. Herman Allenbach	_____	_____
Non-Party Dorothy Kelly	_____	_____
Non-Party Jerry Kelly	_____	_____

(INSTRUCTION: If you answered Question 2 "no" as to the defendant, sign this verdict form. If you answered Question 2 "yes" as to the defendant, go to Question 3.)

QUESTION 3: Was such negligence a proximate cause of injury to the plaintiff?

(Answer "yes" or "no" after the name of the defendant and each non-party, if any, to which you answered "yes" in Question 2.)

ANSWER:

	Yes	No
Defendant Church	_____	_____
Non-Party Dr. Herman Allenbach	_____	_____
Non-Party Dorothy Kelly	_____	_____
Non-Party Jerry Kelly	_____	_____

(INSTRUCTION: If you answered Question 3 "no" as to the defendant, sign this verdict form. If you answered Question 3 "yes" as to the defendant, go to Question 4.)

QUESTION 4: Did Mr. Loholt's abuse of plaintiff occur prior to February 1972?

ANSWER: Yes _____ No _____

1 QUESTION 5: Was Dr. Herman Allenbach an agent of defendant acting within the
2 scope of his authority with respect to his acts or omissions regarding Mr. Loholt?
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4 ANSWER: Yes _____ No _____
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6 (INSTRUCTION: If you answered Question 5 "yes", go to Question 6. If you
7 answered Question 5 "no", go to Question 7.)
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10 QUESTION 6: Assume that 100% represents the total combined negligence that
11 proximately caused the plaintiff's injury. What percentage of this 100% is attributable to the
12 defendant and what percentage of this 100% is attributable to each non-party, if any, whose fault
13 was found by you in Question 3 to have been a proximate cause of the injury to the plaintiff?
14 Your total must equal 100%.
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16 ANSWER:
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To Defendant Church	_____ %
To Non-Party Dorothy Kelly	_____ %
To Non-Party Jerry Kelly	_____ %
TOTAL	100%

18 (INSTRUCTION: Skip Question 7 and go to Question 8).
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QUESTION 7: Assume that 100% represents the total combined negligence that proximately caused the plaintiff's injury. What percentage of this 100% is attributable to the defendant and what percentage of this 100% is attributable to each non-party, if any, whose fault was found by you in Question 3 to have been a proximate cause of the injury to the plaintiff? Your total must equal 100%.

ANSWER:

To Defendant Church	_____ %
To Non-Party Dr. Herman Allenbach	_____ %
To Non-Party Dorothy Kelly	_____ %
To Non-Party Jerry Kelly	_____ %
TOTAL	100%

QUESTION 8: What do you find to be the plaintiff's amount of damages?

ANSWER: \$ _____

QUESTION 9: What percentage of the damages in your answer to Question No. 8 do you find were caused by negligent conduct and what percentage were caused by Mr. Loholt's intentional conduct? (Your total must add up to 100%)

ANSWER:

Negligent	_____ %
Intentional	_____ %
Total	100%

(INSTRUCTION: Sign this verdict form and notify the bailiff.)

DATE: _____

Presiding Juror

Defendant's Authority: Defendant's proposed special verdict form adapts the pattern verdict form in WPI 45.21 to the facts of this case. Two added questions, 4 and 5, merit some explanation. If the Court does not grant Defendant's directed verdict motion that Dr. Allenbach is *not* an agent as a matter of law, Question 5 is necessary because the Court and the parties must know whether the jury finds him to be an agent. The outcome of the answer to Question 5 determines which question the jury must then answer, questions that contain a different list of entities to whom the jury can assign a percentage of fault. *Cf.*, Questions 6 and 7. If Dr. Allenbach is an agent, then he is no different than any other agent of COP and the jury could not assign him a percentage of fault separate from that of the Church (see Question 6). That is, in event of his agency, the Church would be legally responsible for his negligence and to assign him fault separately would be "double counting." On the other hand, if he is not an agent, he is a person to whom the jury can assign fault (see Question 7).

Question 4 is included for reasons of judicial efficiency. Having this answer may eliminate a trial in the event of an appeal and reversal. For example, if the jury finds in favor of plaintiff based solely on agency of Dr. Allenbach, and the Ninth Circuit later rules that Dr. Allenbach was not an agent as a matter of law, then there would be no fact issue to retry if the jury has found that the abuse preceded February 1972. If the abuse preceded notice to COP regarding Mr. Loholt, COP would not have owed plaintiff a duty.

As to Plaintiff's proposed verdict form, it is objectionable for numerous reasons. First, it deviates significantly from the relevant pattern verdict form, WPI 45.21, without justification. Second, the form of the questions is improper. Instead of asking the relevant question, "was defendant negligent," it contains a series of questions that repetitively pose the negligence issue in argumentative terms. Third, Question 5 introduces an issue—failure to train—on which there

1 will be no testimony in this case. Plaintiff has no liability expert with regard to the standard of
 2 care, circa 1972, regarding training of clergy on matters of sexual abuse. Fourth, Question 7 asks
 3 whether the parties had a special relationship which gave rise to a duty; this is a question of law,
 4 not fact. Fifth, plaintiff omits Dr. Herman Allenbach as a non-party who can be found negligent.
 5 Plaintiff is free to argue Dr. Allenbach was an agent, but if the jury disagrees he needs to be
 6 listed as a non-party at fault. Sixth, as set forth in WPI 45.21, the negligence (or not) of
 7 defendant and the non-parties is determined in the same question. Seventh, Question 13 is
 8 improper for the reasons discussed in COP's objections to Plaintiff's proposed instruction
 9 number 3 on burden of proof. If the jury were to find defendant negligent, this question would
 10 necessarily have been answered "yes," and the instruction's imposition of a burden of proof on
 11 defendant is inconsistent with *Tegman* and this Court's ruling on the *Tegman* motion.
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13 **Plaintiff's Objections/Argument in Support of Plaintiff's Verdict Form:**

14 **Questions 1-6 of Plaintiff's Revised Proposed Verdict Form: (Formerly Plaintiff's**

15 **Questions 1-8).** Plaintiff's verdict form demonstrates, in plain language, the various methods by
 16 which the defendant can be liable for plaintiff's injuries or damages. To ask the jury to
 17 determine "negligence" based on a single question of "were any of the following negligent" does
 18 not provide any guidance to the jury for the determination of what is negligent conduct. In
 19 contrast to defendant's proposed verdict form, Plaintiff's proposed verdict form contains a
 20 question on each of the plaintiff's theories in this case. Plaintiff should be permitted to argue all
 21 of his theories of liability to the jury. *See, e.g., Dang v. Gilbert Cross*, 422 F.3d 800, 804-05 (9th
 22 Cir. 2004). Furthermore, asking a global "negligence" question is contrary to the principal that
 23 jury instructions should be written in plain language which is easily understood by the average
 24 juror. *See, e.g., 9th Cir. Pattern Instructions, Introductory Comment to Preliminary Instructions*

1 ("preliminary jury instructions are intended to give the jury, briefly **and in understandable**
2 **language**, information to make the trial more meaningful." (emphasis added)); *see, also*
3 *Gulliford v. Pierce County*, 136 F.2d 1345, 1348 (9th Cir. 1998) ("jury instructions must be
4 formulated so that they fairly and adequately cover the issues presented, correctly state the law,
5 and are not misleading.")
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11 Furthermore, practical considerations govern allowing the jury to find liability on the
12 separate theories. Defendant has made it clear that it intends to appeal this Court's ruling that
13 violation of the mandatory reporting statute creates an implied cause of action. Plaintiff believes
14 the Court ruled correctly. However, as of this date, no appellate court has made that
15 determination. In the event the 9th Circuit determines that an implied cause of action was not
16 created, the absence of knowing the basis for the jury's imposition of liability will, of necessity,
17 require a re-trial. In contrast, a re-trial will not be necessary if, for instance, the jury determines
18 COP's liability based on common law principles.
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27 **Question Nos. 7-8 of Plaintiff's Original Proposed Verdict Form:** Withdrawn.
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29 **Question No. 6 of Plaintiff's Proposed Verdict Form (Revised):** There was extensive
30 testimony from Randall Borland about the lack of training on the issue of the duty to report
31 known instances of child abuse. Bishop Borland specifically testified that he received no formal
32 training, could not recall what, if any, literature he received on how to deal with complaints of
33 child sexual abuse, did not know he was a mandatory reporter, received no training on
34 interviewing or investigating complaints of childhood sexual abuse, etc. The record is clear that
35 he received no training with regard to sexual abuse and how to deal with complaints thereof.
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37 This testimony was not of such a nature that an expert witness need to explain the issue to the
38 jury. The determination of whether the Mormon Church did, or did not, provide training to its
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1 clergy members is not beyond the common understanding of jurors. FRE 702 provides, in
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3 pertinent part, "if scientific, technical or other specialized knowledge will assist the trier of fact
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5 to understanding the evidence. . . ." An expert is not necessary when the subject matter is within
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7 the common experience of jurors or is not beyond the common understanding of jurors. In fact,
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9 when the jury does not need the assistance of an expert to understand an issue, an expert should
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11 be excluded because the aura of expertise may cause the jury to place too much reliance on the
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13 testimony. *Tegland*, COURTROOM HANDBOOK ON WASHINGTON EVIDENCE, Rule 702, pg. 341
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15 (2006).

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17 Here, the testimony was that the Mormon Church provided absolutely no training to its
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19 clergy members on the duty to report. An expert was simply not necessary.
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21 **Defendant's Proposed Question re: Allenbach as an negligent party:** Asking the jury
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23 to impose a percentage of liability prior to determining whether COP is responsible for
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25 Allenbach's conduct is illogical and will be confusing to the jury. Furthermore, these are the
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27 court's instructions to the jury and, as a consequence, the instruction carry the weight of the
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29 Court. Asking the jury to determine negligence prior to determine whether COP is responsible
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31 for Allenbach's conduct is suggestive that COP is not, in fact, responsible. However, plaintiff
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33 concedes that the jury must determine whether Allenbach was acting an agent for COP during
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35 relevant times and the Plaintiff's Proposed Special Verdict Form (Revised) contains such a
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37 question.
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39 ***Tegman* argument:** Defendant's argument changes *Tegman* from a rule requiring
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41 segregation of damages arising from negligent conduct from damages arising from intentional
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43 conduct into an "intervening and superseding cause" argument. Furthermore, the jury is not
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45 allocate a **percentage** of damages between negligent and intentional tortfeasors. Instead, the

1 jury is to allocate the **amount** of damages because the negligent and intentional tortfeasors. *See*,
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 3 *e.g.*, *Tegman*, 150 Wn.2d at 118-119. Plaintiff's Proposed Special Verdict Form (Revised) more
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 5 accurately reflects that distinction.
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7 **Statute of Limitations Question:** The statute of limitations for a claim based on
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 9 childhood sexual abuse is triggered when the victim **subjectively** makes the connection between
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 11 the abuse and his or her harm. *Hollman v. Corcoran*, 89 Wn. App. 323, 949 P.2d 386 (1997)
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 13 (the limitations period is tolled until the "victim of childhood sexual abuse *in fact* discovers the
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 15 causal connection between the defendant's acts and the injuries for which the claim is brought."
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 17 *Id.* (emphasis added). Furthermore, the Washington Supreme Court has held that in enacting this
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 19 statute the Legislature "specifically provided for a broad and generous application of the
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 21 discovery rule to civil actions for injuries caused by childhood sexual abuse." *C.J.C. v.*
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 23 *Corporation of Catholic Bishop of Yakima*, 138 Wn.2d 699, 712, 985 P.2d 262 (1999)
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25 Here, the **only** testimony on when Robert Kelly connected his injuries to the sexual abuse
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 27 was that of Dr. Conte. Dr. Conte opined that, to this day, Robert Kelly has not made the
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 29 requisite connection. There is no evidence to the contrary. The Court should determine, as a
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 31 matter of law, that the statute of limitations has not run on plaintiff's claim and plaintiff will be
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 33 moving for a directed verdict on that issue. Defendant's proposed Question No. 1 should be
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 35 stricken.
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37 **Defendant's Proposed Question No. 4:** The defendant is free to argue that Robert
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 39 Kelly's abuse occurred prior to the time COP received notice that Loholt was a pedophile. If so,
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 41 the jury will find against the plaintiff. However, making a specific inquiry as to when plaintiff's
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 43 abuse occurred places too much emphasis on defendant's theory of the case. Furthermore,
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 45 defendant has no valid basis for including such a question and, instead, admits that it is doing so

solely for the purpose of having to avoid re-trial in the event of (a) an appeal and (b) a reversal.

The question should not be asked.